

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **Date of Decision: 20.10.2010**

% **O.M.P. No.288/2010**

RAM KRISHAN & SONS CHARITABLE TRUST
THROUGH MR TARUN PATWA Petitioner

Through: Navin Chawla, Advocate.

versus

SHAURYA EDUCATIONAL INSTITUTE /SOCIETY
& ORS. Respondents

Through: Mr. Sandeep Sharma, Advocate.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI

1. Whether the Reporters of local papers may : No
be allowed to see the judgment?
2. To be referred to Reporter or not? : Yes
3. Whether the judgment should be reported : Yes
in the Digest?

VIPIN SANGHI, J. (Oral)

1. The petitioner has preferred this petition under Section 9 of the Arbitration and Conciliation Act to seek a restraint against the respondent from in any manner using/advertising/offering admission to student by using, the trademark 'The Banyan Tree School' or any other trade mark or name similar to the said trade mark of the petitioner either as a trade mark or part of a trade mark or as a trade name or corporate name. The petitioner also seeks an injunction against the respondent from admitting students to its school under the name 'The Banyan Tree School', or in any manner claiming affiliation with the

petitioner. The petitioner also seeks the appointment of a Receiver to seize all products and marketing, promotional and advertising materials, educational literature etc which bear or incorporate the name 'The Banyan Tree School' or any other similar mark. The petitioner also seeks security for an amount of Rs. 10 lakhs which, according to the petitioner, was admittedly due from the respondent.

2. The admitted position is that the parties entered into an agreement dated 12.03.2008 whereunder the petitioner granted license to the respondent to run its school at Jammu with the name 'The Banyan Tree School' and to use the logo and moto of the petitioner for the purpose of the said school. The agreement provided in detail the mechanism of administration of the said school wherein the petitioner retained its control. The agreement was to remain effective for a period of thirty years from the date of commencement, unless terminated in the manner provided under the agreement. Clause 10 of the agreement provided that if any of the parties at any time wishes to terminate the agreement, it shall do so by giving 18 months prior notice in writing to the other party of such intention, provided that such notice was to be effective only at the close of the academic session following after the 18 months.

3. Clause 11(a) provided the mechanism for winding up of the affairs of the said school upon the termination of the agreement and also delineated the rights and obligations of the parties, post termination. Clause 11(b) provided that on termination of the

agreement and in the event of the school in question being closed, the respondent will not use the name/logo of “The Banyan Tree School” at the school in question or at any other location. For breach of the said condition, the respondent agreed to be liable to pay compensation at the rate of Rs.50,000/- per day without prejudice to any action that the petitioner may take against the respondent society for violation of the said clause. Clause 12 contained the arbitration agreement between the parties which read as follows:-

“12. That all questions relating to the interpretation and meaning of this Agreement and any other dispute and difference arising between the parties hereto, either during subsistence of this Agreement or upon termination thereof, shall be referred to a SINGLE ARBITRATION to be appointed by the RK Trust, whose decision shall be final, conclusive and binding on the parties to this Agreement.”

4. Clause 13 of the agreement records that the agreement has been entered into at Delhi and that any dispute between the parties shall be subject to the jurisdiction of the Courts in Delhi only.

5. The case of the petitioner is that during the working of the said agreement, there were various breaches committed by the respondent. The petitioner, accordingly, communicated its intention to terminate the agreement. It is the case of the petitioner that thereafter the parties entered into a deed of dissolution dated 20.04.2009. According to the petitioner, the purpose of the said deed of dissolution was to curtail the notice period stipulated in clause 10 of

the agreement, and to ensure the respondent stops the user of the petitioner's trade mark/trade name 'The Banyan Tree School' after 31.03.2010. According to the petitioner the said deed of dissolution was sent by the petitioner for the signature of the respondent. However, the same was not signed and sent back by the respondent. Accordingly the petitioner issued a communication dated 23.06.2009 requiring the respondent to sign the said deed of dissolution.

6. The petitioner submits that it was shocked to learn in the month of May 2010 that the respondent was continuing to use the petitioner's trade mark/trade name 'The Banyan Tree School' by issuing advertisement for making admissions for the academic session 2010-11. The petitioner has placed on record the advertisement issued by the respondent, namely the Shaurya Educational Trust in this regard. Consequently, the petitioner has preferred this petition.

7. Upon issuance of notice in this petition the respondent has put in appearance and filed its reply. The respondent does not dispute, and rather admits, the deed of dissolution between the parties. Mr. Sharma, learned counsel for the respondent has raised a preliminary submission with regard to the maintainability of this petition and the jurisdiction of this Court to entertain the present petition. He submits that the arbitration agreement contained in the agreement dated 12.03.2008 does not survive as the said agreement has been novated by the deed of dissolution, which substitutes all the rights and obligations of the parties under the original agreement, and

the deed of dissolution does not contain any arbitration agreement between the parties. He submits that consequently the arbitration agreement contained in the original agreement dated 12.03.2008 has perished and cannot be invoked by the petitioner. He further submits that the petitioner has unnecessarily impleaded various other respondents, namely, respondents 2 to 7 who are not even parties to the agreement dated 12.03.2008 as the agreement was entered into only between the two societies.

8. In support of his submission, Mr. Sharma has placed strong reliance on the judgment of this court in ***Seema Bhatia v. Yamaha Motor India Pvt. Ltd.***, 144(2007) DLT 772 decided by a learned single Judge of this Court.

9. In this case a dealer sales agreement had been entered into between the parties on 01.11.1996 for sale and service of respondent's products. Disputes arose between the parties inasmuch as the plaintiff owed certain amounts to the defendant. On 08.12.2000, an agreement/MOU was entered into between the parties by exchange of letters. The disputes did not get resolved even thereafter. The defendant invoked arbitration clause contained in the Dealer Sales Agreement dated 11.11.1996. Thereafter the plaintiff filed the suit for declaration and permanent injunction. The defendant moved an application under Section 34 of the Arbitration Act, 1940 to seek a stay of the suit filed by the plaintiff by relying upon the arbitration agreement contained in the Dealer Sales Agreement. The plaintiff

contended that by virtue of the MOU, the original Dealer Sales Agreement stood novated and that there was no subsisting arbitration agreement, as the MOU did not contain any arbitration clause.

10. The plaintiff, it appears, placed reliance on the decision reported as ***M/s Saraswati Industrial Syndicate Ltd. V. M/s Apollo Tyres Limited***, ILR(1986) 1 Delhi 382. This judgment had been approved by the Division Bench of this Court in ***Jindal Aromatic V. South Coast Spices Exports Pvt. Ltd***, 106(2003) DLT 708(DB).

11. On the other hand, the defendant (applicant under Section 34 of the Arbitration Act) placed reliance on the decision of the Supreme Court in ***Lata Construction and Ors. V. Dr. Rameshchandra Ramniklal Shah and Anr***, (2000) 1 SCC 586, ***United Bank of India V. Ramdas Mahadeo Prashad and Ors***, (2004) 1 SCC 252 and the judgment of the Calcutta High Court in ***Juggilal Kamlapat V. N.V. Internationale Crediet-En-Handels Vereeniging 'Rotterdam'***, AIR 1955 Cal 65.

12. The learned single Judge, in the facts of the case before him, came to the conclusion that the line of decisions in ***Saraswati Industrial*** (supra) were applicable in that case, and the decisions of the Supreme court in ***Lata Construction & Ors.*** (supra), ***United Bank of India*** (supra) and ***Juggilal Kamlapat*** (supra) did not apply in the facts of that case.

13. It would be useful to quote the relevant paras from the decision in **Seema Bhatia** (supra):

“19. On hearing learned Counsels for the parties, I am of the considered view, there is no doubt that there were dues outstanding from the plaintiff to the defendant as acknowledged by the plaintiff. Such dues arose out of the DSA dated 1.11.1996. It was open to the defendant at that stage to institute proceedings for recovery of the dues and take recourse to the methods provided under the agreement for such recovery. In view of the existence of the arbitration clause, the disputes were liable to be referred to arbitration. The parties, however, did not refer the disputes to arbitration but entered into a fresh agreement on 8.12.2000. The agreement reproduced aforesaid shows that this was the result of the discussion between the representatives of the two parties and provided the then existing status of the stock and outstanding, the recovery plan and in default the consequence to flow to the plaintiff. The case of the defendant itself is that the larger concession was shown to the plaintiff than was envisaged under the DSA dated 1.11.1996. It is this agreement which crystallized the rights and liabilities of the parties.

20. It was open to the parties at that stage to have stated that this MOU/agreement dated 8.12.2000 was only in furtherance of the DSA dated 1.11.1996 and that the arbitration clause would continue to apply. It was also open to the parties to have incorporated an arbitration clause in the subsequent agreement/MOU dated 8.12.2000. Neither of the two things were done.

21. The observations made in *Saraswati Industrial Syndicate Ltd. v. Apollo Tyres Limited* case (supra), in my considered view, squarely apply to the facts of the present case. In fact, there is a similarity in the factual matrix of both the cases. An agreement having an arbitration clause and the arbitration clause not being resorted to but a subsequent agreement/MOU having been entered into between the parties for resolution of the disputes and even thereafter the disputes not being resolved. In both

cases, the MOU was acted upon. The Division Bench of this Court in *Jindal Aromatic v. South Coast Spices Exports Pvt. Ltd.* case (supra) has approved the judgment in *Saraswati Industrial Syndicate Ltd. v. Apollo Tyres Limited* case (supra) and thus the legal proposition propounded in these two judgments are binding on this Court. The legal position has been succinctly set out that an accord discharges the performance of obligations under the contract and a dispute pertaining to satisfaction furnishes a fresh and independent cause of action, until and unless it is provided that the performance of the satisfaction was a condition precedent for discharge under the contract. There is no such stipulation in the present agreement in question.

22. The judgment in *United Bank of India v. Ramdas Mahadeo Prashad and Ors.* case (supra) would have no application since the judgment proceeds on the basis that there was no concluded settlement or novation. In the present case it is not even in dispute that there was a concluded settlement dated 8.12.2000. Similarly the observations in *Lata Construction and Ors. v. Dr. Rameshchandra Ramniklal Shah and Anr.* case (supra) show that there have to be alternations of the original terms of contract by agreement between the parties for a recession to take effect. In case the two contracts are inconsistent and they cannot stand together, the subsequent contract cannot be said to be in substitution of the earlier contract. There is no dispute that in the present case there are no such inconsistent contract but it is also simultaneously not in dispute that the subsequent agreement contained certain concessions not envisaged in the earlier contract, thus, this judgment would also not come to the aid of the defendant. The observations in *Juggilal Kamlapat v. N.V. Internationale Credit-En-Handles Vereeniging 'Rotterdam'* case (supra), are on the facts of the case that the modifications do not go to the root of the contract and do not change its essential character and can hardly apply to the factual matrix of the present case more so in view of the judgment of the Division Bench in *Jindal Aromatic v. South Coast Spices Exports Pvt. Ltd.* case (supra)."

14. The issue that calls for examination is whether the agreement dated 12.03.2008 stood novated by the deed of dissolution dated 20.04.2009.

15. The deed of dissolution in its recitals records that both the parties wish to terminate their agreement dated 12.03.2008 w.e.f. 31.03.2010. It records that the *"parties have waived the requisite 18 months prior notice in writing as per clause 10 of the said agreement"*. The said deed records that the agreement shall cease w.e.f. 31.03.2010. Clauses 3 and 4 of this deed of dissolution read as follows:-

"3. It has been agreed by the SE Society that it shall abide by the terms of the said Agreement, more particularly Clause 11 thereof upon dissolution.

4. It is agreed between the parties that consequent to termination as per Clause 11 of the Agreement, all claims between the parties shall stand settled accordingly and S.E. Society undertakes not to use the name, the Banyan Tree School, its motto/logo for any purpose (including educational activities) and at any place beyond 31.3.2010, and the "R.K.Trust" undertakes not to give licence to any other Society/Organization to open another branch of the Banyan Tree School in Jammu before 31.3.2012."

16. From the aforesaid clause, it is clear that the parties provided that the respondent *"shall abide by the term of the said agreement, more particularly Clause 11 thereof upon dissolution"*. It also provided that *"consequent to termination as per Clause 11 of the agreement, all claims between the parties shall stand settled accordingly and S.E. Society undertakes not to use the name, The Banyan Tree School, its*

motto/logo for any purpose (including educational activities) and at any place”.

17. On a reading of the aforesaid deed of dissolution, it is clear that the purpose and intention of the parties while entering into the said deed was primarily to curtail the notice period from the 18 months period provided in clause 10 of the agreement dated 12.03.2008 and to provide that after 31.03.2010, the respondents shall not use the trade mark/trade name “The Banyan Tree School”. It also provided that the termination shall be in accordance with clause 11 of the said agreement.

18. On a reading of the deed of dissolution, I cannot agree with the submission of learned counsel for the respondent that the deed of dissolution intended to extinguish the rights of the parties arising out of the original agreement dated 12.03.2008. On the contrary, the agreement clearly provided that the respondent shall abide by the terms of the said agreement. Merely because the parties emphasized that the respondent shall abide by clause 11 thereof, it does not mean that the other clauses of the said agreement were given a go-by. The reason why emphasis was laid on clause 11 appears to be that clause 11 deals with the rights of the parties, post termination. The intention of the parties was not to substitute the original agreement dated 12.03.2008 with a new agreement. It was, in fact, intended to act as a catalyst in attaining the termination of the agreement in accordance with clause 11, by cutting short the termination period provided for in

clause 10 of the original agreement. I am, therefore, of the view that the decisions noted by the learned single Judge in the case of **Lata Construction** (supra), **United Bank of India** (supra) and **Juggilal Kamlapat** (supra) are attracted and not the decision in **Saraswati Industrial Syndicate Ltd.** (supra).

19. Unlike in the case of **Saraswati Industrial Syndicate Ltd.** (supra) in this case the respondent has not acted in accordance with the deed of dissolution, even if it were to be accepted for the for the sake of argument that the said deed of dissolution novated the agreement dated 12.03.2008. The deed of dissolution does not contain any accord between the parties in relation to the disputes arising under the agreement dated 12.03.2008 and, therefore, the said deed cannot be said to discharge the performance of its obligations by the respondent under the agreement dated 12.03.2008. As aforesaid, the deed of dissolution specifically seeks to reinforce the rights of the parties under clause 11 of the agreement dated 12.03.2008 which deals with the aspect of mechanism for winding up all the affairs of the school in question upon termination of the agreement and delineates the rights and obligations of the parties post termination. Since I am of the view that there was no concluded settlement of by the deed of dissolution, the judgment in **United Bank of India** (supra) and **Lata Construction & Ors.** (supra) would apply. Learned counsel for the respondent has not been able to point out as to how there was complete substitution of the agreement dated 12.03.2008. By the new

agreement i.e. the deed of dissolution, far from rescinding the agreement dated 12.03.2008, it sought to enforce the same, inter alia, in relation to clause 11 thereof. The only clause which the parties sought to waive by entering into the deed of dissolution was clause 10 of the agreement dated 12.03.2008 so as to do away with the requirement of giving an 18 months' notice for the termination of the agreement dated 12.03.2008. It cannot be said that the deed of dissolution rescinded, altered or extinguished the agreement dated 12.03.2008. As the modification sought to be achieved by the deed of dissolution pertained only to Clause 10 of the agreement dated 12.03.2008, it cannot be said that the modification went to the root of the agreement dated 12.03.2008, and the agreement dated 12.03.2008 remained intact in its essential character. I am, therefore, of the view that the judgment in **Juggilal Kamlapat** (supra) applies to the facts of this case rather than the judgment in **M/s Saraswati Industrial Syndicate Ltd.** (supra) and **Seema Bhatia** (supra).

20. For the aforesaid reasons, I reject the primary submission of the respondent.

21. From the original agreement as well as the deed of dissolution, it is amply clear that the respondent was merely granted a licence, which was revocable, to enable the respondent to use the petitioner's trade name and trade mark 'The Banyan Tree School'. The said licence stands terminated. After 31.03.2010 the respondent has no right to use the said trade name/mark, logo or motto of the

petitioner.

22. The submission of learned counsel for the respondent that the respondent has paid a sum of Rs. 20 lakhs to the petitioner and the petitioner, in turn, has not incurred any amounts in fulfillment of its obligations under the agreement cannot be a reason good enough to permit the respondent to infringe the petitioner's trademarks. In case the respondent has any claims, it shall be open to the respondent to prefer the same before the arbitral tribunal.

23. Accordingly, I allow this petition and grant the injunction prayed for in prayers a(i) and (ii). The said injunction shall continue to operate during the pendency of the arbitral proceedings and shall abide by the award rendered by the arbitral tribunal. This order shall not prejudice the case of either party on the merits of their respective claims/counter claims raised before the arbitral tribunal. The petition stands disposed of with costs quantified at Rs.50,000/-.

VIPIN SANGHI, J.

OCTOBER 20, 2010
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